UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

ELAINE ROBINSON, *et al.*, Plaintiffs-Appellees vs. PFIZER, INC., Defendant-Appellant	No. 16-2524 *On appeal from the United States District Court for the Eastern District of Missouri, 4:16-cv-00439-CEJ*

PLAINTIFFS-APPELLEES' REPLY IN FURTHER SUPPORT OF MOTION TO DISMISS APPEAL

Defendant-Appellant Pfizer, Inc. ("Pfizer") argues that its appeal is not moot because, it claims, it has suffered a reputational injury that remains live even after the filing of the Satisfaction of Judgment below. But the authority of this Court on which Pfizer relies, *Perkins v. Gen. Motors Corp.*, 965 F.2d 597 (8th Cir. 1992), does *not* hold that a reputational injury creates a case or controversy sufficient to avoid dismissal, and the majority of Circuits to consider the issue have refused to so hold. Even under the minority rule, permitting appeal on the basis of reputational injury alone, no such injury is present here, because the district court's fee-shifting order was not a sanction and did not implicate the reputation of Pfizer's lawyers, nor indeed, of Pfizer itself. Moreover, in *Perkins*, the defendant had merely "agreed" not to collect the sanctions award at issue, whereas here Plaintiffs-Appellees' ("Plaintiffs") right to any fee award has been entirely extinguished.

Indeed, although Pfizer contends that a reputational injury prevents this appeal from being moot, it makes little or no attempt to show that such an injury exists and

does not even attempt to conceal the true purpose of this appeal, to obtain "a *de novo* examination of whether the remand order was legally correct," *see* Pfizer Opp. at 1, an issue that, as Pfizer recognizes, is otherwise not reviewable in this Court. Because Pfizer can obtain no relief from any ruling on this question, such a *de novo* examination could produce only an advisory opinion from this Court on the issue of removal in multi-plaintiff cases.[1] That is precisely what the constitutional "case or controversy" requirement prohibits. Moreover, although Pfizer fails to say so, this Court has the power, upon dismissal of this appeal, to vacate the fee award below as moot. *See Clark Equipment Co. v. Lift Parts Mfg. Co. Inc.*, 972 F.2d 817 (7th Cir. 1992). Such a dismissal would fully protect any reputational interest that could conceivably exist, but would not provide Pfizer with the advisory precedent it seeks and that is the true purpose of this appeal. This sham purpose does not, however, provide a live controversy sufficient to meet the constitutional requirements for jurisdiction. Pfizer's appeal should be dismissed as moot.

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[1] Even if this Court were permitted to issue advisory opinions – which it is not – this is not a situation that cries out for advice, because the issue on which Pfizer seeks an advisory opinion is not one on which guidance from this Court is lacking. In *In re Prempro Prods. Liab. Litig.*, 591 F.3d 613, 619 (8th Cir. 2010), this Court addressed the question of fraudulent misjoinder in similar circumstances, and held that Rule 20 permits "all reasonably related claims for relief by or against different parties to be tried in a single proceeding," without requiring "[a]bsolute identity of all events." *Prempro*, 591 F.3d at 622. This Court has also held that "if the nondiverse plaintiff is a real party in interest, the fact that his joinder was motivated by a desire to defeat federal jurisdiction is not material." *Iowa Pub. Serv. Co. v. Med. Bow Coal Co.*, 556 F.2d 400, 404 (8th Cir. 1977).

ARGUMENT

I. PFIZER'S APPEAL IS MOOT

Pfizer's appeal is moot for the reasons set forth in Plaintiffs' motion: because of the Satisfaction of Judgment filed below, "it is impossible for a court to grant any effectual relief whatever to the prevailing party." *Campbell-Ewald Co. v. Gomez*, 136 S. Ct. 663, 669 (2016). Pfizer contends that, under *Perkins*, vindication of its reputation is sufficient potential relief to support jurisdiction.[2] But *Perkins* does not so hold, and the majority of the Circuits to consider the issue have rejected Pfizer's position. And even under the minority rule, there can be no reputational injury to support jurisdiction here.

A. The *Perkins* Court Did Not Address the Mootness of the Appeal

In *Perkins*, the district court imposed sanctions under Fed. R. Civ. P. 11 and 28 U.S.C. § 1927(against plaintiff's counsel), as well as under Fed. R. Civ. P. 26(g) (against both plaintiff and her counsel) for a series of egregious violations, including making false statements to the court. 965 F.2d at 600-602. The parties then settled the underlying case, and the defendant "agreed not to collect monetary sanctions." 965 F.2d at 600. When the district court refused, upon the motion of all parties, to lift the sanctions order, the plaintiff and her attorney (the "petitioners") sought a writ of mandamus in this Court, seeking to compel the district court to lift the sanctions.

[2] Plaintiffs do not dispute that a fee award under § 1447(c) is appealable *when the fees awarded are still at issue*. But, as Pfizer implicitly concedes, no monetary award is at issue on this appeal. The question is whether Pfizer's purported reputational injury, standing alone, can provide a basis for jurisdiction. As explained in the text, it cannot.

Although this Court denied the mandamus petition, it found the sanctions order appealable. But in doing so, the *Perkins* Court did *not* address the possible mootness of the appeal.

Indeed, it does not appear that any party in *Perkins* argued that the appeal was moot. Rather, in seeking to have the sanctions order lifted, the petitioners argued that "the *sanction order* is moot" because the defendant had agreed not to collect it. 965 F.2d at 600 (emphasis added).[3] The distinction is critical because *the petitioners were not contending that the Court lacked jurisdiction and were not seeking dismissal of the appeal.* On the contrary, they asked the Court *to take jurisdiction of the appeal* in order to vacate and lift the sanctions order. Thus, the only argument about mootness presented to the Court, and the only one addressed by it, was an argument that the *underlying* order was moot *and therefore should be vacated on appeal.* 965 F.2d at 600. Because no party asked the Court to dismiss the appeal as moot, this Court had no occasion to address that question.

It is true that the district court, as respondent on the mandamus petition, *see* 965 F.2d at 599 n.3, argued that this Court lacked jurisdiction over the appeal, but its argument *was not based on mootness.* 965 F.2d at 599. Rather, the district court argued that the sanctions order, which had not been reduced to a monetary amount, was not a

[3] The defendant's "agreement" in *Perkins* not to collect a sanctions award does not appear to have had the same legal effect as the Satisfaction of Judgment filed here, as defendant there may have had a legal right to collect an award, despite their agreement not to do so, while Plaintiffs here have none. *Perkins* is thus distinguishable, and inapplicable, on this basis as well.

final, appealable order, and thus was not reviewable in this Court. Thus, the only jurisdictional argument before this Court in *Perkins* was not based on mootness, and the only mootness argument was not addressed to the jurisdiction of this Court.

B. The Majority of Circuits Do Not Recognize Reputational Injury as a Basis for Appeal

Pfizer asks this Court to extend *Perkins* to an issue never considered in that case, whether reputational injury prevents an appeal from a fee award becoming moot when the fees themselves are no longer at issue. But there is good reason for this Court to construe *Perkins* narrowly and to decline to extend it. The First, Sixth, Seventh, Ninth, and Federal Circuits have all found the reputational injury of an attorney, standing alone, insufficient to support jurisdiction. *See Tesco Corp. v. National Oilwell Varco, L.P.*, 804 F.3d 1367 (Fed. Cir. 2015) (no remaining case or controversy after settlement; appeal of sanctions order dismissed); *In re Metropolitan Government of Nashville and Davidson Co. TN*, 606 F.3d 855 (6th Cir. 2010) (rejecting conclusion that finding of attorney misconduct, standing alone, constitutes enough of an injury to make finding appealable); *In re Williams,* 156 F.3d 86, 87 (1st Cir. 1998) (mere reputational injury from court's reprimand, without monetary sanction, is insufficient to support appellate jurisdiction); *Clark Equipment Co. v. Lift Parts Mfg. Co. Inc.,* 972 F.2d 817 (7th Cir. 1992) (dismissing appeal as moot following settlement and vacating, as moot, judgment to the extent it imposed sanctions); *Riverhead Savings Bank v. National Mortgage Equity Corp.*, 893 F.2d 1109, 1112 (9th Cir. 1990) (where Rule 11 sanctions awarding attorneys' fees and

costs were payable to opposing party, rather than to court, settlement mooted appeal). The Eleventh Circuit similarly has found that an underlying settlement moots an appeal from a sanctions award. *See Kleiner v. First Nat'l Bank*, 751 F.2d 1193, 1199–1200 (11th Cir. 1985). This Court should not extend *Perkins* beyond its holding to reach a conclusion rejected by the majority of other Circuits to consider the issue.

C. No Reputational Injury Exists Here Because the District Court Made No Finding of Attorney Misconduct

While a minority of Circuits have held that reputational injury to a lawyer from a sanctions order is sufficient to support appellate jurisdiction, those cases, like *Perkins* (which as noted did not address the issue), all involve findings of attorney misconduct. *See Walker v. City of Mesquite, Tex.,* 129 F.3d 831 (5th Cir. 1997) (finding that lawyer engaged in "blatant misconduct"); *Grider v. Keystone Health Plan Central, Inc.*, 580 F.3d 119 (3d Cir. 2009) (sanctions imposed on defendants, their law firm, and individual lawyers at the firm under Rules 26 and 37, and under § 1927); *Butler v. Biocore Medical Technologies, Inc.*, 348 F.3d 1163 (10th Cir. 2003) (finding that lawyer committed ethical violations); *Agee v. Paramount Communications, Inc.*, 114 F.3d 395 (2d Cir. 1997) (finding that attorney acted in "bad faith"). Indeed, in *Butler*, the Tenth Circuit expressly limited its holding, explaining, "We also wish to make clear that only orders finding misconduct are appealable and not every negative comment or observation from a judge's pen about an attorney's conduct or performance. . . ." 348 F.3d at 1168.

These cases all involve sanctions under Rule 11, Rule 26, and/or § 1927, each of

which requires violations of law or improper conduct. In each case, the court's finding thus cast aspersions on the professional conduct of the attorney. Pfizer does not cite, and Plaintiffs are not aware of, a single case finding a jurisdictionally sufficient appealable reputational interest in the absence of a finding of attorney misconduct in connection with a sanction against an attorney.[4]

This case, by contrast, involves no finding of attorney misconduct, no award against Pfizer's attorneys, and indeed, no sanction. Indeed, although Pfizer repeatedly refers to the fee award here as a "sanction," the district court never used that term. *See* Johnson Dec., Exs. D and E.[5] Nor does § 1447(c) require any finding of misconduct, improper behavior, or violation of law. *See* 28 U.S.C. § 1447(c); *see also Martin v. Franklin Capital Corp.*, 546 U.S. 132, 138 (2005) (declining to require "frivolous conduct" as predicate for fee-award under § 1447(c)). It simply provides for fee-shifting. *See Martin*, 546 U.S. at 37-38, 140 (referring to § 1447(c) as a "fee-shifting" statute and rejecting

[4] *U.S. Through Farmers Home Admin. v. Nelson*, 969 F.2d 626 (8th Cir. 1992), cited by *Pfizer,* is not such a case. In *Nelson*, this Court found that a Bankruptcy Court ruling that a federal agency had violated federal law was appealable even though the violation had caused no harm. This Court did not address the question of reputational injury in *Nelson*, the only harm Pfizer contends is at issue here. (Nor is Pfizer alleged to have violated any law.) Moreover, *Nelson* has never been cited on this point by any court, including this one.

[5] All citations to "Johnson Dec., Ex. __" refer to exhibits submitted with Plaintiffs' motion in the Declaration of Eric S. Johnson in Support of Plaintiffs' Motion to Dismiss.

argument that § 1447(c) is not a fee-shifting statute.)[6]

Pfizer goes to great lengths to show that courts have used the word "sanction" when referring to § 1447(c), but the issue is not whether a fee award has ever in any context been described as a sanction, but rather, even assuming this Court were to adopt the minority, and not the majority, rule with respect to reputational injury, whether this particular fee award injured the reputation of anyone such that vindication of a reputational interest is still at issue on this appeal. It did not.

Contrary to Pfizer's assertions, the district court did not admonish or reprimand Pfizer or its lawyers, or suggest that they had behaved improperly.[7] It simply found a fee award to be justified under the relevant standard, because Pfizer had put Plaintiffs to the trouble of preparing a remand motion for a removal that ought never have been filed. And while the district court did find that Pfizer's removal lacked an "objectively reasonable basis," the court also found, in determining the amount of Plaintiffs' fee award, that "not all of the hours expended [by plaintiff's counsel] were reasonable."

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[6] Pfizer claims that *Martin* rejected the view that § 1447(c) *is* a fee-shifting statute, but that is not so. *See* 546 U.S. at 137-38 (rejecting argument that § 1447(c) is a jurisdictional statute that does not authorize fee-shifting), 140 (establishing proper standard for fee award under § 1447(c) by comparison with other fee-shifting statutes). The word "sanction" does not appear anywhere in the *Martin* opinion.

[7] Pfizer makes much of the court's statement that its removal in this case was made in the face of "repeated admonishments and remands to state court." *See* Pfizer Br. at 10. But any admonishments in the earlier cases are not before the Court and cannot, in any event, be undone on appeal here. And the district court's *description* of any previous admonishments does not give rise to an appealable injury.

Johnson Dec., Ex. E at 1, 3. Although both statements might fairly be read as criticisms, the first of Pfizer itself, the second of Plaintiffs' counsel, neither rises to the level of casting aspersions on anyone's professionalism or reputation. These statements are precisely the kind of "negative comment[s] or observation[s] from a judge's pen" that the Tenth Circuit found did *not* support appellate jurisdiction. *See Butler*, 348 F.3d at 1168. And while Pfizer makes much of the fact that *Plaintiffs*, in seeking a fee award, characterized Pfizer's conduct in harsher terms, the fact remains that the district court did not adopt (or even repeat) Plaintiffs' characterizations and limited its ruling to the standard required for fee-shifting under § 1447(c). Pfizer cannot appeal from Plaintiffs' briefs.

Moreover, even if the court's fee award could be read to cast negative light, it does not give rise to an appealable reputational injury because the award was imposed on Pfizer, not on its attorneys. Pfizer simply cannot explain how a ruling that it removed a case to federal court without an "objectively reasonable basis" could possibly impair its reputation as a pharmaceutical company. The question of professionalism in the conduct of litigation simply does not arise when no attorney's conduct has been called into question.

II. PLAINTIFFS' MOTION TO DISMISS IS TIMELY BECAUSE IT WAS FILED SIX DAYS AFTER THE APPEAL BECAME MOOT

Pfizer argues in the alternative that Plaintiffs' motion is untimely because it was filed more than 14 days after the appeal was docketed. This argument is silly. At the

time the appeal was docketed, it was not moot, as the Satisfaction of Judgment had not yet been filed. The Satisfaction was filed on June 16, 2016, and this motion to dismiss the appeal as moot was promptly filed on June 22, 2016, a mere six days later.

An actual case or controversy must exist throughout the life of a case. *See Hickman v. State of Mo.*, 144 F.3d 1141, 1142 (8th Cir. 1998) (requirement of ongoing case or controversy "applies to all stages of the litigation"); *see also Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc.*, 528 U.S. 167, 191-92 (2000) (arguments of economy "do not license courts to retain jurisdiction over cases in which one or both of the parties plainly lack a continuing interest"). Thus, as this Court has recognized, changed circumstances may render a case moot when it was not moot at the outset. *See, e.g., Ali v. Cangemi*, 419 F.3d 722, 723 (8th Cir. 2005); *Lebanon Chem. Corp. v. United Farmers Plant Food, Inc.*, 179 F.3d 1095, 1099 (8th Cir. 1999); *see also Already, LLC v. Nike, Inc.*, 133 S. Ct. 721, 727 (2013).

In this context, it is clear that Local Rule 47A(b), requiring motions to dismiss "based on jurisdiction" to be filed within 14 days after the court has docketed the appeal, refers to motions based on a jurisdictional defect *already present at the time of docketing*. Where a case subsequently becomes moot, Local Rule 47A(b) cannot be read to preclude an otherwise proper motion to dismiss for want of jurisdiction.

CONCLUSION

For the foregoing reasons, this Court should dismiss this appeal as moot.

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Respectfully submitted,

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